Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ROSALIND K. REED
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit
— And Appendix —

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QUESTIONS PRESENTED

I. WHETHER 18 U.S.C. 3731 ALLOWS THE GOVERNMENT TO SEEK A DISMISSAL AND THEN APPEAL AN ISSUE THAT IS OTHERWISE NOT APPEALABLE.

II. WHETHER GIVING CASH TO A COURIER IN PAYMENT FOR DRUGS CONSTITUTES A "FINANCIAL TRANSACTION" WITHIN THE MEANING OF THE MONEY LAUNDERING STATUTE.

III. WHETHER A DEFENDANT, WHOSE ACTIONS, EVEN UNDER THE PROSECUTION'S VERSION OF THE FACTS WERE LAWFUL UNDER CONTROLLING CIRCUIT LAW AND THE LAW OF OTHER CIRCUITS AT THE TIME OF THE CHARGED ACTIVITY, CAN BE PROSECUTED AFTER A NEW DECISION MAKES THE ACTIONS UNLAWFUL UNLESS DEFENDANT CAN ESTABLISH RELIANCE ON THE EARLIER DECISION.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding before the United States Court of Appeals were as follows:

1. United States of America — Plaintiff-Appellant; and
2. Rosalind K. Reed — Defendant-Appellee.

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CONSTITUTIONAL PROVISION

The Fifth Amendment provides in pertinent part:

No person shall be. . . deprived of life, liberty, or property without due process of law.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

The Petitioner, ROSALIND K. REED, respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 1, 1996.

OPINION BELOW

The opinion of the Court of Appeals (App. 1) is not reported and is attached hereto. The Order of the U.S. District Court is not reported and is attached hereto. APP 12.

JURISDICTION

The judgment of the Court of Appeals was entered on March 1, 1996. This petition is being filed within ninety (90) days of that date as required by Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

1. On October 6, 1994, Defendant-Appellee Rosalind K. Reed was charged in a Third Superseding Indictment returned in the Eastern District of Michigan. *United States v. Richard Sumpter, et. al.*, Cr. No. 94-80095. (R. 157)

Ms. Reed was charged in Count One, along with 29 co-defendants, with conspiracy to possess with intent to distribute and distribution of marijuana, in violation of 21 U.S.C. § 846. Among other allegations, this count asserted that it "was further part of the ways and means of this conspiracy that ROSALIND K. REED arranged for co-conspirators to pay both drug debts and her attorney fees at two meetings in her law office; that ROSALIND K. REED twice stored approximately $96,000 in drug proceeds in her office until they were picked up by money courier DAVID DELACOUR..." "Third Superseding Indictment" (R. 157), Count One, page 5.

In Count Three, Ms. Reed and co-defendant David Delacour were charged with money laundering conspiracy, in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i), 2, & 371. Counts Four and Five each charged Defendant with substantive money laundering offenses, allegedly in violation of 18 §§ U.S.C. 1956(a)(1)(A)(i) & 2. Each of these counts alleged that the "specified unlawful activity" was "a conspiracy to illegally distribute marijuana and the illegal distribution of marijuana." (R. 157)

2. On March 24, 1995, a pleading was filed by the Government entitled "Motion By The United States To Submit Money Laundering Count To The Jury With Instructions That A 'Delivery' Of Cash Is A 'Financial Transaction' ". (R. 427) The "Brief" in support of this motion included a 12 page "Statement of Facts" which began with the statement that "[t]he Government is able to prove the following facts." *Id.*, at 1. The "Brief" then discussed the money laundering statute and the decisions of the Sixth Circuit Court of Appeals in *United States v. Samour*, 9 F.3d 531

(6th Cir. 1993) and *United States v. Oleson*, 44 F.3d 381 (6th Cir. 1995). *Id.*, at 13-16. The "Brief" concluded that "if [the trial] Court [felt] bound by the Sixth Circuit decisions in *Samour* and *Oleson*, the Court should resolve the matter by dismissing the counts *before* the jury is sworn and jeopardy attaches." *Id.*, at 16.

3. "Defendant's Memorandum In Response To Motion By The United States To Submit Money Laundering Counts To The Jury With Instructions That A 'Delivery' Of Cash Is A 'Financial Transaction' " was filed on April 13, 1995. (R.451) Defendant contested the "Statement of Facts" alleged by the Government and asserted that "they will not be proven at trial." *Id.*, at 1. Defendant further argued that the determination concerning the proper jury instructions should be made at the conclusion of the evidence, as is routinely done and is directed by F.R.Crim.P. 30. ("Defendant's Memorandum", at 2) Finally, Defendant suggested that the Government was ethically bound to dismiss a case they knew they could not prove, but noted it would be premature for Defendant to move for dismissal until trial, when a factual record is developed. (*Id.*)

4. A hearing was conducted before district judge Horace W. Gilmore on April 19, 1995.

The Government attorney, consistent with the position taken in his brief, argued that if the court would not agree pretrial to instruct the jury contrary to *Samour* and *Oleson*, "I would want you to sua sponte dismiss these counts so that we can take our appeal." (Hearing of 4/19/95, at 9)

Defense counsel questioned the nature of the instructions given to the grand jury, (*id.*, at 10) noted that even if the Government could obtain a change in the law on appeal it would be *ex post facto* as to Defendant, (*id.*, at 13) and suggested that

the Government should simply dismiss a case they know is not a crime under the controlling law. (*Id.*, at 15).

5. Judge Gilmore dismissed the money laundering counts, stating that "I'm not going to participate in any procedure where we just sit here and go through a proceeding when we know it's against the law to do so." (*Id.*, at 21) An "Order" dismissing the counts was entered on April 20, 1995. (R. 455) The "Order" recites that "there being no factual dispute that the government can prove, at most, with respect to the 'financial transaction' element, deliveries of cash; this Court, pursuant to the holdings in *Oleson* and *Samour* must dismiss..." (*Id.*)

6. A hearing was conducted on May 2, 1995 that concerned, in part, whether the Government was proceeding to trial against Ms. Reed, along with co-defendant Jerome Maddox, on the drug conspiracy alleged in Count One. "Motion Transcript", 5/2/95 The Government conceded they were not prepared to proceed with Ms. Reed as a defendant along with Mr. Maddox. *Id.*, p. 31-32. The parties eventually stipulated to an Order holding Count One in abeyance, as to Ms. Reed, until the instant appeal is resolved. The stipulation requires dismissal of Count One with prejudice if the money laundering counts are not reinstated. "Order" (R. 476)

7. The Government filed a "Notice of Appeal" on April 24, 1995. (R. 486) The Sixth Circuit Court of Appeals granted the Government's petition for initial hearing *en banc*.

8. On March 1, 1996, the Sixth Circuit Court of Appeals overruled its precedent in *Oleson* and *Samour*, reinstated the money laundering counts, and remanded the matter for trial.

9. On April 9, 1996, the Sixth Circuit granted Defendant's Motion To Stay The Mandate, ordering the mandate to be held in abeyance until May 8, 1996.

REASONS FOR GRANTING THE PETITION

I.

18 U.S.C. 3731 DOES NOT ALLOW THE GOVERNMENT TO SEEK A DISMISSAL AND THEN APPEAL AN ISSUE THAT IS OTHERWISE NOT APPEALABLE.

The prosecution could not have appealed an adverse decision on its motion regarding jury instructions. Instead, it asked the district court to dismiss the money laundering counts and then appealed that dismissal.

The Government in this case sought and obtained an indictment based upon facts that did not constitute a crime under controlling law from this circuit. Rather than proceed to trial with a case the Government could not win, it requested the district judge for a ruling, in advance of trial, that the jury be instructed in a manner inconsistent with Sixth Circuit law. This motion requested that, if the district court was unwilling to disregard controlling authority, that the case be dismissed.

The prosecution sought to dismiss a case it could not prove. It has manipulated the judicial process in an attempt to create the appearance of appealability where there is no right to appeal. At the motion hearing, the prosecutor said the Government was not making a motion for voluntary dismissal, but "I would want you (the district judge) to sua sponte dismiss these counts so we can take our appeal." The prosecutor also suggested that the trial judge force the defense to make what, in effect, would be a pretrial Rule 29 motion: "the court can order the Defense, can set a time limit, and say, if you are going to file such a motion, you have to do it before jeopardy attaches."

The trial judge recognized this manipulation:

> THE COURT: Do you have a right as the Government of the United States to pursue a case where the law is clearly agin [sic] you and to require this person to stand trial on a money laundering count where the law has clearly said you have no right to do so?
>
> I think you're running into very serious ethical problems if you say that you do.
>
> I mean, I don't appreciate being in this bind where I'm just playing games. The law is clear.

This manipulation is not consistent with the integrity of judicial process demanded by due process of law, U.S. Const., Amend. V.

In addition to the fact that the prosecution obtained money laundering charges which they could not prove, they admitted at the motion hearing that without the money laundering charges (which they could not prove) they cannot prove the marijuana conspiracy charge:

> THE COURT: You say the ability to prosecute her for conspiracy to distribute marijuana depends totally upon her function as a money launderer, is that what you're saying?
>
> PROSECUTOR: Yes, Your Honor.

Ultimately, the district court refused to rule that it would ignore Sixth Circuit precedent in its instructions to the jury. It then accepted the Government's admission that it could not prove its case and its request that the case be dismissed. The ruling of the district court was proper. There was no error.

The Sixth Circuit Court of Appeals did not address this issue in its opinion.

Background to this Appeal

Prior to the date scheduled for trial in this matter, a pleading was filed by the Government entitled "Motion By The United States To Submit Money Laundering Count To The Jury With Instructions That A 'Delivery' Of Cash Is A 'Financial Transaction' ". It concluded that "if this Court feels bound by the Sixth Circuit precedent, the Court should resolve the matter by dismissing the counts *before* the jury is sworn and jeopardy attaches."

The Government, before the district court, conceded that, even under its best "facts", no violation of the money laundering statute occurred under the Sixth Circuit's interpretation of that statute in *United States v. Samour*, 9 F.3d 531 (6th Cir. 1993), and *United States v. Oleson*, 44 F.3d 381 (6th Cir. 1995). The district court dismissed the money laundering counts, stating that it was "not going to participate in any procedure where we just sit here and go through a proceeding when we know it's against the law to do so."

Government's Right To Appeal

The Government initially sought a pretrial ruling on a proposed jury instruction. Assuming, *arguendo*,[1] that a pretrial ruling should have been made, the Government had no authority to appeal it. Neither party in a criminal case can appeal without express statutory authorization. *See, e.g., United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *Abney v. United States*, 431 U.S. 651 (1977). The statutory provision that allows Government appeals, 18 U.S.C. 3731, does not permit appeal from every

[1] Traditionally, jury instructions are submitted during the trial and ruled upon shortly before closing argument. This procedure is embodied in F.R.Crim.P. 30 which provides for the filing of written requests "[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs" and require the court to "inform counsel of its proposed action upon the requests prior to their arguments to the jury." *Id.*

adverse pretrial ruling. See, *e.g., United States v. White*, 743 F.2d 488 (7th Cir. 1984) (Government not permitted to appeal denial of motion to disqualify defendant's attorney); *United States v. Dean*, 989 F.2d 1205 (D.C. Cir. 1993) (Independent counsel not allowed to appeal order reversing decision of admissibility of evidence). The statute does not provide any basis for appealing from an adverse decision regarding a proposed jury instruction.

The Government could not have appealed an adverse decision on its motion regarding the jury instruction. Instead, it asked the district court to dismiss the money laundering counts and now appeals that dismissal.

The Government invited the district court to dismiss the case in order to secure entry of a final judgment that would support appeal of an otherwise interlocutory and unappealable order. No cases are cited that support the Government's right to proceed in this manner. 18 U.S.C. 3731 should not be interpreted to allow the Government to seek a dismissal and then appeal an issue that is otherwise not appealable. See *United States v. Stipe*, 653 F.2d 446, 449 (10th Cir. 1981).

The Government obtained an Indictment against Rosalind Reed alleging conduct that was not illegal under the controlling law of the Sixth Circuit. Having failed in its effort to have the district court ignore the Sixth Circuit's decisions, the Government requested dismissal. The prosecution sought appellate review of an issue that, except for its own requested dismissal, could not be appealed.

This is an important issue of federal law which should be reviewed by this Court.

II.

GIVING CASH TO A COURIER IN PAYMENT FOR DRUGS DOES NOT CONSTITUTE A "FINANCIAL TRANSACTION" WITHIN THE MEANING OF THE MONEY LAUNDERING STATUTE.

In Count Three of the Third Superseding Indictment, Rosalind Reed and co-defendant David Delacour are charged with money laundering conspiracy, in violation of 18 U.S.C. Sections 1956(a)(1)(A)(i), 2, and 371. Counts Four and Five each charge Rosalind Reed with substantive money laundering offenses, allegedly in violation of 18 U.S.C. Sections 1956(a)(1)(A)(i) and 2. Each of these counts alleged that the "specified unlawful activity" was a conspiracy to distribute marijuana and the illegal distribution of marijuana. (R. 157)

Prosecution Pretrial Motion. On March 24, 1995, the prosecution filed a "Motion By The United States To Submit Money Laundering Count To The Jury With Instructions That A 'Delivery' Of Cash Is A 'Financial Transaction.'" (R. 427) The Brief in support of this motion included a 12-page "Statement of Facts" which began with the statement that "[t]he Government is able to prove the following facts." *Id.* at 1. The Brief states that "the United States has *no* additional evidence that Reed engaged in a 'financial transaction' apart from her role in the 'delivery' or transfer of the cash to a money courier." *Id.* at 16.

Alleged "Facts". "The facts claimed by the Government are these: Richard Sumpter was selling marijuana to Jerome Maddox in Detroit. Maddox, in paying for this marijuana, on two occasions, stored cash in Rosalind Reed's office. On each occasion the cash was picked up by David Delacour, a courier acting on behalf of Sumpter, and eventually transported to California. According to the Government's "facts", Ms. Reed had knowledge of the

contents of the baggage and the purpose for which the money was being transferred.

No allegation is made of a financial transaction which represents the proceeds of some form of unlawful activity. Accepting these "facts" for the purpose of appeal, they do not constitute money laundering.

Dismissal and En Banc Hearing. The trial judge dismissed the money laundering counts in an Order stating that "there being no factual dispute that the government can prove, at most, with respect to the 'financial transaction' element, deliveries of cash; this Court, pursuant to [then controlling Sixth Circuit authority] must dismiss, as a matter of law, Counts 3, 4 and 5 of the Third Superseding Indictment."

On Appeal the en banc Court of Appeals addressed the requirements of 18 U.S.C. 1956(a)(1)(A)(i), holding:

> We read these provisions to mean that giving drug proceeds to a courier is both a transfer and a delivery and involves the movement of funds by means of the courier, which satisfies the definition of "financial transaction" found in § 1956(c)(4)(A)(i). Further, delivering funds to a courier involves monetary instruments, namely the currency, which satisfies the definition found in § 1956(c)(4)(A)(ii).
>
> Thus, except for our decisions in *Samour* and *Oleson*, the allegations against defendant here state a violation of the statute — defendant, knowing that the money was the proceeds of marijuana trafficking, engaged in a financial transaction with the intent to promote the carrying on of further drug activity.[2] We

[2] The Court overruled its decisions in *United States v. Samour*, 9 F.3d 531 (6th Cir. 1993) and *United States v. Oleson*, 44 F.3d 381 (6th Cir. 1995). In *Samour* the Court had found that no money laundering offense was proven on

> turn then to our decisions in *Samour* and *Oleson*. Op. at 6.
>
> * * *
>
> Such conduct constitutes a transfer or delivery for the purposes of establishing a financial transaction. For example, in this case, defendant is alleged to have arranged for the exchange of the proceeds, accepted them into her possession, exercised control over the proceeds for a period of time, and authorized the release of the proceeds to another individual. Under these facts, the defendant here would clearly have effected a disposition of the proceeds. *See United States v. Puig-Infante*, 19 F.3d 929, 938 (5th Cir.), *cert. denied*, 155 S.Ct. 180 (1994).

Conflict of Federal Circuits. Evidence that the buyer of marijuana has delivered and/or transported cash to the seller is commonplace. The appellate decisions have repeatedly refused to find such evidence sufficient to establish money laundering.

In *United States v. Heaps*, 39 F.3d 479, 486 (4th Cir. 1994), the Court stated "the statute should not be interpreted to make any drug transaction a money laundering crime."

Situations in which courts have found that defendant's activities do not constitute financial transactions within the meaning of the statute include: placing cash proceeds in a safety deposit box at bank, *United States v. Bell*, 936 F.2d 337 (7th Cir. 1991); transporting cash from one state to another, *United States v. Dimeck*, 24 F.3d 1239, 1243 (10th Cir. 1994); mere transportation of cash does not constitute a financial transaction, *United States v. Puig-Infante*, 19 F.3d 929, 938 (5th Cir. 1994); storing

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evidence that cash was transported and delivered for payment of marijuana. In *Oleson* the conviction was reversed upon evidence that he had given another person cash to take from Michigan to Texas in payment for marijuana.

money in a shoe box in a closet, *United States v. Ramirez,* 954 F.2d 1035, 1040 (5th Cir. 1992); and no financial transaction within the meaning of the statute since it did not involve an attempt to conceal the source of the proceeds, *United States v. Gonzalez-Rodriguez,* 966 F.2d 918, 925 (5th Cir. 1992).

The reasoning advanced in the various decisions has not always been the same. Some decisions have focused on the requirement that a "financial transaction" occur. Others have determined that the funds are not "proceeds" under the statute. Still other cases have held that the money laundering crime must follow in time the underlying "specified unlawful activity." The cases are in accord, however, in holding that the payment of cash by a narcotics buyer to a seller, whether or not through agents, is not money laundering.

Here the "facts" alleged describe payment of cash by a narcotics buyer to a seller.

It is clear that every transfer or delivery of property is not a violation. It is equally clear that the money laundering statute is not an alternate means to punish ills already prohibited:

> Congress aimed the crime of money laundering at conduct that follows in time the underlying crime rather than to afford an alternative means of punishing the prior "specified unlawful activity." *United States v. Edgmon,* 952 F.2d 1206, 1213-1214 (10th Cir. 1991).
>
> * * * *
>
> Congress intended to prevent an ill other than those already prohibited by other laws. The statute should not be interpreted to make any drug transaction a money laundering crime. *United States v. Heaps, supra,* at 486.

In *United States v. Heaps, supra,* which also involved payment for drugs, money orders had been sent to the defendant as

payment for previously delivered drugs. The defendant's girlfriend picked up the money orders, cashed them, and put the cash in a money box in an apartment she shared with the defendant. Reversing defendant's conviction for violating §§ 1956 (a)(1)(A)(i) and (B)(i), the Fourth Circuit held there was no evidence that the money was used to promote unlawful activity. The Court also stated that "[w]ere the payment for drugs itself held to be a transaction virtually *every* sale of drugs would be an automatic money laundering violation as soon as money changed hands. Understood this way, § 1956 would have such reach that it would criminalize the very same conduct already criminalized by the drug laws . . .". *Id.*, at 485-486. Additionally, the court noted both the disclarity in the law and its disagreement with other circuits:

> To the extent that our holding conflicts with holdings by the Third and Ninth Circuits . . . we must respectfully disagree that the mere receipt of a money transfer and the subsequent placement of cash in a box can, of itself, constitute money laundering under the statute. *Id.* at 486.

In *United States v. Puig-Infante, supra,* the Fifth Circuit considered a money laundering charge arising out of the payment for drugs. The defendant had picked up a load of marijuana in Texas and driven it to Florida. There, she received payment in cash for the marijuana. She then returned to Texas with the money. In reversing the conviction under § 1956(a)(1)(A)(i) because there was no "financial transaction", the Fifth Circuit stated:

> Our conclusion is consistent with that of the Sixth Circuit in *United States v. Samour*, 9 F.3d 531 (6th Cir. 1993). In a case factually analogous to the instant case, the *Samour* court held that "merely transporting [drug money concealed in an automobile]

> does not meet the definition of 'financial transaction' for purposes of the money laundering statute." *Id.* at 536.

United States v. Puig-Infante, supra at 939.

In *Puig-Infante*, the Fifth Circuit also noted that the money laundering statute requires that the financial transaction involve the "proceeds" of specified unlawful activity. The money involved, said the Court, "did not become *proceeds* of unlawful activity until the sale of marijuana was *completed* . . .". *Id.* at 939 (emphasis in original). Although the receipt of the cash for marijuana was a "transaction", it did not involve the "proceeds" of unlawful activity. *Id.*

The requirement of § 1956(a)(1) that the financial transaction involve "proceeds" was discussed in *United States v. Piervinanzi,* 23 F.3d 670 (2nd Cir. 1994). There, the defendant appealed his conviction under § 1956(a)(2), claiming that this provision proscribed only 'laundering' activity that is distinct from the underlying criminal activity that it promotes. Rejecting this argument, the Second Circuit noted that § 1956(a)(2), unlike § 1956(a)(1), contains no requirement that "proceeds" first be generated by unlawful activity, followed by a financial transaction with those proceeds, for criminal liability to attach. *Id.* at 680. The Court noted that § 1956(a)(1) "requires first that the proceeds of specified unlawful activity be generated, and second that the defendant, knowing the proceeds to be tainted, conduct or attempt to conduct a financial transaction with these proceeds with the intent to promote specified unlawful activity."

The importance of the "proceeds" requirement was also recognized in *United States v. Conley,* 37 F.3d 970 (3rd Cir. 1994). In this gambling prosecution, the Court noted that "[a]lthough the money laundering statute does not define when money becomes 'proceeds,' it is obvious to us that proceeds are derived from an already completed offense, or a completed

phase of an ongoing offense, before they can be laundered." *Id.* at 980.

The requirement that the money laundering activity occur after completion of the "specified unlawful activity" was emphasized in *United States v. Edgmon*, *supra*. In rejecting a double jeopardy claim, the Court stated that "Congress aimed the crime of money laundering at conduct that follows in time the underlying crime rather than to afford an alternative means of punishing the prior 'specified unlawful activity.' " *Id.* at 1213-14.

The Tenth Circuit considered an attempt to utilize the money laundering statutes in the context of a payment for drugs in *United States v. Dimeck*, 24 F.3d 1239 (10th Cir. 1994). The defendant had been convicted of conspiracy to launder money in violation of 18 U.S.C. § 1956(a)(1)(B)(i). The evidence showed that Pruneda was shipping marijuana into the Detroit area. The defendant collected funds and delivered them to Moore in Detroit. Moore, in turn, was then to deliver the cash back to Pruneda in California. The Tenth Circuit reversed the defendant's conviction: "Dimeck asserts that the mere delivery of alleged drug-money by one courier to a second courier, who was to deliver the money to the seller of the drugs, does not constitute money laundering under § 1956(a)(1)(B)(i). We agree." *Id.* at 1241.

The *Dimeck* decision found that there was no attempt to conceal or disguise the nature or source of the funds, as required for conviction under § 1956(a)(1)(B)(i). The opinion again emphasized, however, that the money laundering must follow in time the completed narcotics transaction:

> This is why we stressed in *Edgmon* that a violation of § 1956(a)(1)(B)(i) must "follow in time" the completion of the underlying transaction and it had to be activity designed to disguise or conceal the origins of the proceeds... We do not intend to change that traditional sense of when a drug transaction between

> buyer and seller is complete. However, for purposes of the money laundering statute here being analyzed, the underlying drug transaction had not yet been completed and the money laundering activity had not yet begun.
>
> * * *
>
> The money laundering statute was designed to punish those drug dealers who thereafter take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises.

United States v. Dimeck, *supra* at 1246.

Other courts have echoed the view that the money laundering statute is only applicable after the underlying criminal transaction. See *United States v. LeBlanc*, 24 F.3d 340, 346 (1st Cir. 1994) ("Congress designed the statute to fill the gap with respect to the post-crime hiding of ill-gotten gains, and intended money laundering to be a separate crime distinct from the underlying offense that generated the money."); *United States v. Stavroulakis*, 952 F.2d 686, 691 (2nd Cir. 1992) ("Section 1956 creates the crime of money laundering, and it takes dead aim at the attempt to launder dirty money. Why and how that money got dirty is defined in other statutes. Section 1956 does not penalize the underyling unlawful activity."); *United States v. Johnson*, 971 F.2d 562, 569 (10th Cir. 1992) ("Congress targeted only those transactions occurring after proceeds have been obtained from the underlying unlawful activity.")

The Sixth Circuit's brief analysis herein conflicts with the requirements stated by the other circuits of proof that funds are proceeds, following in time the specified unlawful activity. Allegations of a financial transaction within the statutory meaning clearly require more than the Sixth Circuit view herein.

Further, there is disclarity and conflict in the decisions of the federal circuits in applying the requirements of the statute.

Finally, here it is clear that the alleged "facts" herein do not allege a financial transaction that conceals its nature or that follows in time a completed drug transaction. The statute should not be interpreted to make any drug transaction a money laundering crime. The "facts" alleged herein do not describe a money laundering offense.

This is an important issue of federal law which should be settled by this Court.

III.

WHERE A DEFENDANTS ACTIONS, EVEN UNDER THE PROSECUTION'S VERSION OF THE FACTS, WERE LAWFUL UNDER CONTROLLING CIRCUIT LAW AND THE LAW OF OTHER CIRCUITS AT THE TIME OF THE CHARGED ACTIVITY, APPLICATION OF A NEW INTERPRETATION OF 18 U.S.C. 1956(a)(1)(A)(i) TO THIS CASE IS VIOLATIVE OF DUE PROCESS OF LAW.

A. *A New Interpretation*

Application of the Sixth Circuit's new interpretation of 18 U.S.C. 1956(a)(1)(A)(i) in this case would violate Ms. Reed's Fifth Amendment guarantee of due process of law. The Sixth Circuit's prior statement of the law in *United States v. Samour,* 9 F.3d 531 (6th Cir. 1993) was rendered prior to any of the alleged conduct charged in the indictment. Ms. Reed's alleged activity, as conceded by the prosecution, was not a violation of the statute under the decision in *Samour.* The Sixth Circuit's action to overrule its own decision was not foreseeable.

Here, the

1. Judicial expansion of the statue,

2. Judicial circuit disclarity as to the scope of the statute, and

3. Statutory language on its face

do not provide "fair notice" to a person of ordinary intelligence that conduct such as that alleged here would violate the statute.

The prosecution's pretrial appeal in this case was based on its admitted inability to sustain a conviction on the allegations in the Indictment under then prevailing Sixth Circuit Court of Appeals case law.

Here the en banc Sixth Circuit acknowledged that under its precedent, *United States v. Samour,* 9 F.3d 531 (6th Cir. 1993), no conviction could be sustained by the allegations made herein:

> Thus, except for our decisions in *Samour* and *Oleson,* the allegations against defendant here state a violation of the statute — defendant, knowing that the money was the proceeds of marijuana trafficking, engaged in a financial transaction with the intent to promote the carrying on of further drug activity. We turn then to our decisions in *Samour* and *Oleson*. Op., at 6.

In *Samour, supra,* the Sixth Circuit found that no money laundering offense was proven on evidence that cash was transported and delivered for payment of marijuana.

The defendant in *Samour* was convicted under 18 U.S.C. §§ 1956(a)(1)(A)(i) and (a)(1)(B)(i) upon evidence that he had, on four separate occasions, provided money to one Reynolds in Columbus, Ohio, for delivery to individuals in Tucson, Arizona, as payment for marijuana. The Sixth Circuit reversed the conviction: "Because no financial transaction within the meaning of the

money laundering statute occurred in this case, we reverse Samour's convictions for money laundering with directions that these charges be dismissed." *Id.* at 536. The court noted that it was "reluctant to conclude that a physical transportation of money, whether it is domestic or international, constitutes a 'financial transaction' within the meaning of section 1956(a)(1) because Congress specifically created a separate subsection for mere transportation of funds." *Id.*

Samour relied, in part, on *United States v. Bell,* 936 F.2d 337 (7th Cir. 1991) and *United States v. Gonzalez-Rodriguez,* 966 F.2d 918 (5th Cir. 1992) in holding that no "financial transaction" occurred. In *Bell*, the Seventh Circuit held that placing drug proceeds in a safe deposit box did not constitute a "financial transaction". The same result was reached by the Fifth Circuit in *Gonzalez-Rodriguez* upon evidence that the defendant was arrested with drug money in her possession in an airport. See also, *United States v. Ramirez*, 954 F.2d 1035 (5th Cir. 1992) (defendant's hiding of drug proceeds in the closet of his brother's house was not a "financial transaction".)

Samour was followed by the Sixth Circuit in *United States v. Oleson*, 44 F.3d 381 (6th Cir. 1995). Finding *Samour* to be dispositive, Oleson's conviction was reversed upon evidence that he had given another person cash to take from Michigan to Texas in payment for marijuana.

Then, after acknowledging that no conviction could be sustained herein under the law established in *Samour*, the Sixth Circuit overruled that precedent:

> Upon re-examination of these cases and the money laundering statute, we now overrule *Samour* and *Oleson* to the extent that those cases found that the conduct of the respective defendants in delivering the money to a courier did not amount to, in the parlance of § 1956, "conduct[ing] or attempt[ing] to conduct" a "transfer

> [or] delivery" that "involv[ed] the movement of funds by wire or other means" or involved "currency of the United States."
>
> Such conduct constitutes a transfer or delivery for the purposes of establishing a financial transaction. For example, in this case, defendant is alleged to have arranged for the exchange of the proceeds, accepted them into her possession, exercised control over the proceeds for a period of time, and authorized the release of the proceeds to another individual. Under these facts, the defendant here would clearly have affected a disposition of the proceeds. *See United States v. Puig-Infante*, 19F.3d 929, 938 (5th Cir.), *cert. denied*, 115 S.Ct. 180 (1994). Op. at 7.

The Sixth Circuit went on the say "we do not hold that the mere transportation of cash meets the definition of a financial transaction. There must be a purchase, sale, transfer, delivery, etc. — some disposition of funds." Op. at 7.

It is clear that the Sixth Circuit holding herein not only is a sharp departure from its precedent, but contradicts precedent that "the statute should not be interpreted to make any drug transaction a money laundering crime." See, *e.g., United States v. Heaps*, 39 F.3d 479, 486 (4th Cir. 1994).

B. *An Ex Post Facto Law*

New standards do not deter newly-forbidden acts, for those acts already would have taken place. Moreover, retroactive application is unfair because it punishes for acts that were not illegal when committed.

The first decision of this Court interpreting the Ex Post Facto Clause has been definitive. In *Calder v. Bull*, 3 Dall. 385, 390, this Court held that a law is an ex post facto law if it makes

criminal acts which were not forbidden when they occurred, if it increases the punishment for criminal acts or if it "alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender."

A law is an ex post facto law if "in [its] relation to the offense, or its consequences [it] alters the situation of a party to his disadvantage" or "takes away or impairs the defense which the law has provided the defendant at the time of the offense." *Kring v. Missouri* 107 U.S. 221, 228-229.

In *Bouie v. Columbia,* 378 U.S. 347 (1964), this Court considered the application of the Fourteenth Amendment due process clause to a case where a state court had broadened the scope of criminal statute that was "definite and precise" on its face. The Court said:

> Indeed, an unforeseeable enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art I, § 10 of the Constitution forbids. An ex post facto law has been defined by this Court as one "that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action," or "that *aggravates* a *crime,* or makes it *greater* than it was, when committed." *Calder v. Bull,* 3 Dall 386, 390, 1 L.Ed 648, 650.

Bouie v. Columbia, supra at 353.

In *Bouie,* this Court held that when an "unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." *Id.,* at 354-355; *see also, Douglas v. Buder,* 412 U.S. 430, 432 (1973).

This Court again reviewed a due process claim resulting from a judicial decision's enlargement of the scope of a statute in *Marks v. United States,* 430 U.S. 188 (1977). The decision in *Marks* is significant for several reasons.

First, *Marks* clearly recognized the ex post facto limitations included within the Fifth Amendment due process clause:

> "The Ex Post Facto Clause is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government. But the principle on which the Clause is based — the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties — is fundamental to our concept of constitutional liberty. As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment."

Id., at 192.

Second, *Marks* made clear that the due process/ex post facto analysis was not restricted to a situation, such as in *Bouie,* where the statutory language was "definite and precise". The statute involved in *Marks,* involving transportation of obscene materials, "has used sweeping language to describe that which is forbidden". *Id.,* at 195.

Finally, *Marks* held that a court overruling its own precedent is unforeseeable for due process purposes. This Court's decision in *Miller v. California,* 413 U.S. 15 (1973) had given the statute a broader reach than the earlier decision in *Memoirs v. Massachusetts,* 383 U.S. 413 (1966) (plurality opinion). The Court applied the principle that a court overruling its own precedent is unforeseeable for due process purposes even though the decision overturned was only a plurality decision. *Marks v. United States, supra* at 192-96; *see also Devine v. New Mexico Dept. of Corrections,* 866 F.2d 339, 345 (10th Cir. 1989).

C. *Individual Reliance Is Irrelevant.*

In response to the clear ex post facto nature of application of the Sixth Circuit ruling herein to this case, the court stated, "to raise the question of whether the application of this decision to defendant is a violation of due process she must first establish the fact that she relied on our earlier decision in *Samour.*"

In *Bouie v. Columbia*, *supra*, the court stated "we think it irrelevant that petitioners at one point testified that they had intended to be arrested:

> The determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and other pertinent law, rather than on the basis of an ad hoc appraisal of the subjective expectations of particular defendants. *Id.*, at n.5.

Similarly, in *Marks v. United States*, *supra*, there is no discussion regarding individual reliance.

It is irrelevant whether this particular defendant had fair warning of the prohibitions of the statute. Rather, the question is whether the statute provides fair warning of its prohibitions to men of common intelligence, on an objective basis.

There was no fair warning of the Sixth Circuit's new interpretation of 18 U.S.C. 1954(a)(1)(A)(i).

This is an important issue of federal law which should be settled by this Court.

CONCLUSION

This Petition for Writ of Certiorari should be granted.

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Appendix A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1996 FED App. 0072P (6th Cir.)
File Name: 96a0072p.06

No. 95-1567

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ROSALIND K. REED,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Michigan

Decided and Filed March 1, 1996

Before: MERRITT Chief Judge; KENNEDY, MARTIN, MILBURN, NELSON, RYAN, BOGGS, NORRIS, SILER, BATCHELDER, DAUGHTREY, and MOORE, Circuit Judges.

KENNEDY, J., delivered the opinion of the court, in which MERRITT, C.J., MARTIN, MILBURN, NELSON, RYAN, BOGGS, NORRIS, SILER, BATCHELDER, DAUGHTREY, and MOORE, JJ., joined. MARTIN, J. (pp. 9-11), also delivered a separate concurring opinion.

Appendix A

KENNEDY, Circuit Judge. The government appeals the pre-trial dismissal of three counts of money laundering on the basis that the delivery or transfer of cash is not a "financial transaction" within the meaning of the money laundering statute, 18 U.S.C. § 1956. A majority of this court voted to hear this case *en banc*. For the following, reasons, we reverse the decision of the District Court.

I.

Defendant Rosalind K. Reed, a criminal defense attorney, is charged with two counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i) for, on each of two ocasions, accepting approximately $100,000, which represented the proceeds of unlawful activity, and then arranging for delivery of the currency to California with the intent of promoting a client's continued marijuana trafficking.[1] She is also charged in a conspiracy count relating to the same acts. The government filed a pretrial motion to submit these money laundering counts to the jury with the instructions that "a 'delivery' of cash is a 'financial transaction' " under the statute.

The government's brief in support of the motion sought to distinguish this case from this Court's decisions in *United States v. Samour,* 9 F.3d 531 (6th Cir. 1993), and *United States v. Oleson,* 44 F.3d 381 (6th Cir. 1995), which held that when a defendant delivered or caused the delivery of cash representing drug proceeds to another person for the purchase of more drugs, it was "mere transportation" and was not a violation of § 1956(a)(1)(A)(i).

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[1] Since we are reviewing the dismissal of counts in an indictment, we read the indictment as a whole, accept the factual allegations as true, and construe those allegations in a practical sense with all of the necessary implications. *United States v. Barker Steel Co., Inc.,* 985 F.2d 1123, 1125 (1st Cir. 1993).

Appendix A

In support of its motion, the government filed a brief indicating that its evidence would tend to establish the following:

At the time of her indictment on drug and money laundering charges, defendant was representing one Richard Sumpter. Sumpter was arrested in Detroit, Michigan, after he took possession of a van that had been driven from California to Michigan loaded with 560 pounds of marijuana. Apparently, Sumpter intended that this shipment of marijuana be sold by Jerome Maddox. Maddox lived in Detroit and was Sumpter's local distributor of marijuana. Maddox was also a neighbor of defendant. She, Sumpter, and Maddox were friends and defendant knew that Sumpter and Maddox were involved in the ongoing distribution of marijuana. Defendant was engaged to represent Sumpter.

During the course of this representation, defendant learned that Maddox owed Sumpter approximately $500,000 in past drug debts. Defendant conveyed messages back and forth between Sumpter and Maddox so they could determine the exact amount of the debt. Once they determined the exact amount, defendant facilitated repayment of the debt; she told Maddox to bring his marijuana proceeds to her office and arranged for the transfer of the money to a courier, who took the money back to California for Sumpter.

Two such transfers took place according to the government. The first occurred on or about February 11, 1994. Defendant arranged a meeting between Maddox and Sumpter's wife, who travelled to Detroit from California, so that Maddox could repay a portion of the money he owed Sumpter. The meeting took place at defendant's law office. When both individuals were present, defendant momentarily left her office, and Maddox gave Sumpter's wife approximately $96,000. Maddox then left the office and defendant returned. Pursuant to a prearranged plan, defendant and Sumpter's wife put the money in a bag and hid it in

defendant's office where it would be picked up by a courier and transported to California for Sumpter. Within a few days a courier did indeed arrive at defendant's office. At defendant's direction, the office receptionist gave the bag containing the money to the courier.

The second transfer of marijuana proceeds occurred approximately one month later, on or about March 10, 1994. Defendant informed Maddox that Sumpter's wife was coming back to Detroit in order to collect more of the drug debt. Maddox arrived at defendant's office, as instructed by defendant, with approximately $96,000 in a cardboard box. He gave this money to Sumpter's wife. Once Maddox left, defendant and Sumpter's wife discussed the retrieval of the money by a courier. They put the money in a suitcase and, as before, hid it in defendant's office. A few days later the same courier arrived at defendant's office, took the suitcase, and transported the money to California. Federal agents arrested the courier upon his arrival in California.

The District Court, after finding itself bound by *Samour* and *Oleson,* denied the government's requested jury instruction and dismissed the money laundering counts. The government appealed pursuant to 18 U.S.C. § 3731, which authorizes it to appeal in a criminal case from an order dismissing an indictment as to any one or more counts.

II.

The sole issue we revisit *en banc* is a discrete question of statutory interpretation: Whether the delivery or transfer of cash, which is the proceeds of unlawful activity, to another person is a financial transaction within the meaning of the money laundering statute, 18 U.S.C. § 1956. The government argues that it is, and that this court, sitting *en banc,* should overrule *Samour* and *Oleson* to the extent that the holdings of those cases are inconsistent with this position.

Defendant argues that *Samour* and *Oleson* were correctly decided and that the facts alleged do not constitute a financial transaction for the purposes of the money laundering statute.[2]

III.

A.

The counts dismissed by the District Court all alleged that defendant violated Title 18 U.S.C. § 1956(a)(1)(A)(i). That section states, in pertinent part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity —
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity;
>
> * * *
>
> shall be [punished as set forth in this subsection].

"Financial transaction" is defined in § 1956(c)(4), which states, in pertinent part:

> the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or

---

[2] Defendant also argues that the transaction alleged by the government does not satisfy the interstate commerce requirement in § 1956(b)(4). In light of the disposition of this case, and the fact that this argument was not considered below, we decline to address it sitting *en banc*. Defendant remains free to advance this argument in the first instance in the District Court.

more monetary instruments...

"Transaction" is defined in § 1956(c)(3):

> the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition...

Finally, the term "Monetary instruments" is defined in 1956(c)(5) and includes "currency of the United States."

We read these provisions to mean that giving drug proceeds to a courier is both a transfer and a delivery and involves the movement of funds by means of the courier, which satisfies the definition of "financial transaction" found in § 1956(c)(4)(A)(i). Further, delivering funds to a courier involves monetary instruments, namely the currency, which satisfies the definition found in § 1956(c)(4)(A)(ii).

Thus, except for our decisions in *Samour* and *Oleson,* the allegations against defendant here state a violation of the statute — defendant, knowing that the money was the proceeds of marijuana trafficking, engaged in a financial transaction with the intent to promote the carrying on of further drug activity. We turn then to our decisions in *Samour* and *Oleson.*

B.

The District Court dismissed the money laundering counts in the indictment because it found itself bound by this court's opinions in *United States v. Samour,* 9 F.3d 531 (6th Cir. 1993) and *United States v. Oleson,* 44 F.3d 381 (6th Cir. 1995).

Samour involved a defendant (Samour) who was convicted of money laundering under § 1956(a)(1)(A)(i) and (B)(i). On four separate occasions, Samour transferred drug proceeds to a courier who, in turn, used the proceeds to purchase marijuana and settle outstanding drug debts. *Samour,* 9 F.3d at 533-34. A panel of this court examined § 1956(a)(1)(A)(i) and the statutory

definition of financial transaction in § 1956(c)(4) and concluded that "merely transporting cash does not meet the definition of a 'financial transaction' for purposes of the money laundering statute." *Id.* at 536. Applying this rule to the facts of the case as it understood them, a divided panel decided that Samour's activities constituted mere transportation and hence reversed his money laundering conviction. *Id.*

In *Oleson* a jury convicted the defendant of money laundering under § 1956(a)(1)(A)(i) for giving a courier over $100,000 in drug proceeds for the purpose of facilitating continued marijuana trafficking. *Oleson,* 44 F.3d at 384. The panel, finding *Samour* dispositive, held that these facts did not establish a requisite financial transaction and reversed the conviction. *Id.*

Upon re-examination of these cases and the money laundering statute, we now overrule *Samour* and *Oleson* to the extent that those cases found that the conduct of the respective defendants in delivering the money to a courier did not amount to, in the parlance of § 1956, "conduct[ing] or attempt[ing] to conduct" a "transfer [or] delivery" that "involv[ed] the movement of funds by wire or other means" or involved "currency of the United States."

Such conduct constitutes a transfer or delivery for the purposes of establishing a financial transaction. For example, in this case, defendant is alleged to have arranged for the exchange of the proceeds, accepted them into her possession, exercised control over the proceeds for a period of time, and authorized the release of the proceeds to another individual. Under these facts, the defendant here would clearly have effected a disposition of the proceeds. *See United States v. Puig-Infante,* 19 F.3d 929, 938 (5th Cir.), *cert. denied,* 115 S. Ct. 180 (1994).

We do not hold that the mere transportation of cash meets the definition of a financial transaction. There must be a purchase, sale, transfer, delivery, etc. — some disposition of funds.

However, this is not a case of mere transportation. A jury could conclude that the conduct alleged in the indictment constitutes a financial transaction under the statute. Accordingly, we reverse the decision of the District Court and reinstate counts three, four, and five of the indictment. Our understanding of the statute is consistent with other circuits that have discussed the issue of whether a transfer or delivery of cash is a financial transaction within the meaning of 18 U.S.C. § 1956. *See United States v. Dimeck,* 24 F.3d 1239, 1246 (10th Cir. 1994); *Puig-Infante,* 19 F.3d at 937-39.

C.

Finally, defendant argues that due process bars her prosecution based on any interpretation of the money laundering statute announced in this decision. She reasons that at the time of the alleged conduct, *Samour* was the law of the circuit, so she had no "fair notice" that she was actually violating the law. *See United States v. Harriss,* 347 U.S. 612, 617 (1954).

To raise the question of whether the application of this decision to defendant is a violation of due process she must first establish the fact that she relied on our earlier decision in *Samour.*[3] *See United States v. Rodgers,* 466 U.S. 475, 484 (1984). Only then does the legal issue of whether defendant's reliance was justified become ripe for consideration. *See Id.* Accordingly, this argument must first be raised in the District Court.

IV.

For the foregoing reasons, we reverse the order of the District Court dismissing the third, fourth, and fifth counts of the

[3] We note that this Court decided *United States v. Oleson,* 44 F.3d 381 (6th Cir. 1995), after the conduct in the indictment was alleged to have occurred.

indictment, and remand this case to the District Court for further proceedings consistent with this opinion.

BOYCE F. MARTIN, JR., Circuit Judge, concurring. I join the *en banc* court in its judgment and join with Judge Kennedy in much of the reasoning of her opinion, but write separately to point out two important issues this case presents which I believe need to be emphasized.

First, I note that "[t]he temptation of many men of good will is to cut corners, take short cuts, and reach the desired end regardless of the means," *Hannah v. Larche,* 363 U.S. 420, 494 (1960) (Douglas, J., dissenting). In this case, the United States presented facts to the district court perhaps insufficient to sustain a conviction under 18 U.S.C. § 1956(a)(1)(A)(i), given our prior interpretation of that criminal statute in *United States v. Samour,* 9 F.3d 531 (6th Cir. 1993), and *United States v. Oleson,* 44 F.3d 381 (6th Cir. 1995). The government then requested a specific jury instruction knowing it was contrary to the law of this Circuit. After the district court refused the proffered instruction, the United States asked the district court to dismiss the indictment as to the money laundering charges for the sole purpose of eventually obtaining an *en banc* review of this Circuit's previous interpretations of Section 1956(a)(1)(A)(i). In essence, the United States sought a dismissal of its own indictment in order to obtain a review of a law it did not like. Judge Kennedy's majority opinion makes no mention of this fact, and I simply emphasize here that our opinion should not be read as condoning such behavior.

The United States argues that this Circuit's interpretation of Section 1956(a)(1)(A)(i) foreclosed other avenues of review, save seeking a dismissal of its money laundering counts for the purposes of *en banc* review in the unique situation presented here. Be that as it may, I believe the district court erroneously dismissed the indictment upon the motion of the United States

Attorney. The defendant, Rosalind Reed, should have been tried on the charges contained in the original multi-count, multi-defendant indictment. I believe, under either this or the superseding indictment, the United States should be able to try Reed and her co-defendants for attempting to conduct a financial transaction that in fact involved a transfer of the proceeds of drug money for the purposes of furthering future specified unlawful activity.

However, we have no way of knowing whether the United States is able to prove anything at this stage of the case. In the district court, the United States simply sought a particular jury instruction on the definition of "financial transaction" knowing full well that, as it was phrased, the instruction was contrary to the law of this Circuit. When the district court refused, the United States asked for a dismissal of the money laundering counts in the indictment in order to pursue this appeal. In the meantime, Reed is left to ponder her impending prosecution because the United States has suspended prosecution against Reed on the other counts charged in the indictment pending this appeal. In any event, I simply point out that we should not encourage the use by the United States of this sort of procedural mechanism each time it disagrees with this Circuit's interpretation of a criminal statute. *See United States v. Stipe,* 653 F.2d 446, 449 (10th Cir. 1981) (condemning the United States' attempt to "change the law of this circuit in order to expedite the prosecution of the case at hand").

Second, I note that the facts set forth in the majority opinion have not been proven, and we have no way of knowing whether Reed in fact committed the acts alleged in the indictment. The United States, of course, must prove that Reed knew the cash represented the proceeds from illegal activity and that she transferred the money with the intent to promote a specified unlawful activity. I fully agree with the majority's comment that "mere transportation" is not a violation of Section 1956(a)(1)(A)(i).

Appendix A

However, if the United States can establish that Reed was involved with a large scale drug operation, that she knowingly accepted and secured the proceeds of unlawful activity, and then transferred them to another for the purpose of furthering the drug operation, the government would establish a violation of Section 1956(a)(1)(A)(i). Because no proof as to this alleged activity has been established, I cannot but agree with the majority that a trial should proceed.

Appendix B

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

D-26 ROSALIND K. REED,
Defendant.

CRIMINAL NO. 94-80095
HON. Horace Gilmore

_____ /

ORDER

The United States having moved this Court to instruct the jury that a "delivery" of cash is a "financial transaction" within the meaning of Title 18 United States Code, Section 1956, for Counts 3, 4 and 5; the United States having set forth the facts that the United States believes it can prove at trial; the Court having determined that the requested instruction is not permitted pursuant to *United States v. Oleson,* 44 F.3d 381 (6th Cir. 1995) and *United States v. Samour,* 9 F.3d 531 (6th Cir. 1993); and there being no factual dispute that the government can prove, at most, with respect to the "financial transaction" element, deliveries of cash; this Court, pursuant to the holdings in *Oleson* and *Samour* must dismiss, as a matter of law, Counts 3, 4 and 5 of the Third Superseding Indictment.

IT IS HEREBY ORDERED THAT Counts 3, 4 and 5 of the Third Superseding Indictment are dismissed.

/s/ HORACE W. GILMORE

HORACE W. GILMORE
UNITED STATES DISTRICT JUDGE

Dated: April 20, 1995